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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 548

UNITED RAILROAD OPERATING CRAFTS, A RAILWAY LABOR ORGANIZATION NATIONAL IN SCOPE, AND WILLIAM E. FLOWERS, F. R. GIBBS, SR., D. R. KELLY, C. L. SHEAY, AND H. W. HARMON INDIVIDUALLY AND ON BEHALF OF ALL OTHER MEMBERS OF THE PLAINTIFF LABOR ORGANIZATION AS A CLASS WHO ARE TOO NUMEROUS TO BE MADE PARTIES PLAINTIFF,

Petitioners,

— against —

THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION, AND THE BROTHERHOOD OF RAILROAD TRAINMEN, A VOLUNTARY RAILROAD LABOR ORGANIZATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWARD J. FRUCHTMAN,
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners—the United Railroad Operating Crafts, a railway labor organization, and William E. Flowers, F. R. Gibbs, Sr., D. R. Kelly, C. L. Sheay, and H. W. Harmon, individually and on behalf of all other members of the

petitioner organization similarly situated — respectfully pray that a writ of certiorari issue to review the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, prior to judgment in the Court of Appeals for the Seventh Circuit where said cause is pending on appeal as No. 10914.

The District Court ruled that it had jurisdiction of the subject matter presented by petitioners' complaint but held against petitioners on the merits, determining that the United Railroad Operating Crafts was not, during the sixty-day period subsequent to April 1, 1952, "national in scope" within the meaning of the Union Shop Amendment to the Railway Labor Act.

Inasmuch as the basic jurisdictional question presented by the District Court's ruling is now before this Court in two other petitions, Nos. 472 and 513, petitioners seek review in this case of that same jurisdictional issue. They are not asking, by this Petition, for any review of the ruling on the merits. Petitioners' reasons for this somewhat extraordinary step appear below in Point I of the heading "Reasons for Granting the Writ."

OPINION BELOW.

The Report and Findings of Fact and Conclusions of Law of the Special Master (R. 242-54 and 256-60) and the order of the District Court adopting and confirming them (R. 271) have not been reported. The cause is now pending on appeal in the Court of Appeals for the Seventh Circuit and, in the ordinary course of events, would not be argued until sometime in late February, 1954.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. C. Section 1254 (1) (62 Stat. 928).

QUESTION PRESENTED.

In view of the fact that the District Court ruled that it had jurisdiction of the subject matter, as petitioners contended, but ruled against petitioners on the merits, the question to be decided—the correctness of the District Court's jurisdictional determination—is essentially the same as questions Nos. 2, 5, and 6 in Case No. 472 and question No. 4 in Case No. 513. It may be stated as follows:

Does a district court of the United States have jurisdiction, in a case brought before it under Section 1337 of Title 28 of the U. S. Code, to decide whether or not a given railway labor organization is "national in scope" within the meaning of the Union Shop Amendment to the Railway Labor Act and a union shop agreement entered into pursuant thereto, or has the Railway Labor Act deprived the court of jurisdiction in such a case?

STATUTES INVOLVED.

Title 28, U. S. C., Section 1337:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Title 45, U. S. C. Sections 152 and 153 (the Railway Labor Act, Sections 2 and 3):

The Union Shop Amendment to the Railway Labor Act, Public Law 914, 81st Congress, appears as Section 152 Eleventh of the Act.

STATEMENT.

This case, like Nos. 472 and 513, arises by reason of the fact that railroad employees, here of the Pennsylvania Railroad Company, have been claimed not to have complied with a union shop agreement between the railroad and the collective bargaining representative, in this instance the Brotherhood of Railroad Trainmen. Specifically, it was asserted that the employees had failed to comply inasmuch as the organization to which they belonged, the United Railroad Operating Crafts, was not "national in scope."

On March 26, 1952, the Pennsylvania Railroad Company and the Brotherhood of Railroad Trainmen (BRT) entered into a union shop agreement, effective April 1, 1952, with respect to the employees represented by the BRT (Exhibit A attached to the Complaint, R. 12-19). The agreement provided that employees in the crafts and classes involved must, as a condition of continued employment, become and remain members of the BRT "within sixty (60) calendar days of the date they first perform compensated service as such employes after the effective date of this agreement * * *"(R. 12). As required by subsection (c) of the Union Shop Amendment to the Railway Labor Act, Section 2 Eleventh, the agreement provided further that the requirement of membership in the BRT was not applicable to "employes * * * who maintain membership in any one of the other labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employes of a craft or class in engine, train, yard or hostling service * * *" (R. 13).

The individual petitioners, William E. Flowers, Frank R. Gibbs, Sr., Daniel R. Kelly, Charles L. Sheay, and Harry W. Harmon, are employees of the Pennsylvania Railroad. Petitioners Gibbs, Kelly, Sheay, and Harmon are yard

conductors, with periods of service with the Pennsylvania of not less than 31, 27, 30, and 30 years respectively (R. 116-17, 110, 124, and 121-22). Petitioner Flowers, a yard brakeman, had, as of November 1952, only seven months of service with the railroad (R. 114).

In June of 1952 each of these employees was notified by the railroad that he had been cited by the BRT for noncompliance with the union shop agreement (R. 8, 17-20). Each of them asked for a hearing before the System Board of Adjustment established by the union shop agreement (R. 15-16); they were notified that the hearings would take place in Philadelphia, Pennsylvania, on July 9, 1952 (R. 8, 21). Inasmuch as their usual place of employment was Chicago, the petitioners objected to being required to make showings of compliance at hearings in Philadelphia. Consequently, on July 7, 1952, they filed suit in the District Court for the Northern District of Illinois, Eastern Division, alleging the United Railroad Operating Crafts was "national in scope" and asking, among other things, that their discharges be enjoined (R. 5-21).

On July 8, 1952, a rule to show cause and temporary order preventing the railroad from discharging the men was entered by Judge Philip L. Sullivan (R. 22). On August 4, 1952, the Brotherhood of Railroad Trainmen was allowed to intervene as a party defendant (R. 35-36), and pleadings were filed by the Pennsylvania and the BRT (R. 23-34, 36-43, and 44-51). The answer of the Pennsylvania and the original answer of the BRT did not challenge the jurisdiction of the court. In its amended answer, however, the BRT asserted that the court lacked jurisdiction of the subject matter inasmuch as (1) under the Railway Labor Act, and the union shop agreement between the railroad and the BRT, "exclusive jurisdiction of disputes arising out of the interpretation or application" of the agree-

ment was vested in the System Board of Adjustment; and (2) the question as to the "national in scope" status of UROC was one to be decided in accordance with the administrative provisions of Section 3 First (f) of the Railway Labor Act (R. 44).

On September 19, 1952, the cause was referred to a Special Master "to take evidence on the issues raised by the pleadings in this matter and by the Rule to Show Cause and to report the same, together with his findings of fact and conclusions of law" (R. 51-52).

The Special Master held hearings and heard evidence on November 10, 12, 13, 17, 18, 19, and 20, 1952. The parties submitted briefs on the issues raised, and the Brotherhood of Locomotive Engineers was permitted to file briefs as *amicus curiae;* it argued only that the court lacked jurisdiction for substantially the reasons stated in the BRT's Amended Answer. But despite the challenge to jurisdiction contained in its Amended Answer, the BRT did not argue against the court's deciding the cause on the merits.

On March 27, 1953, the Special Master submitted his Report, and on April 17, 1953, his Findings of Fact and Conclusions of Law (R. 242-54 and 256-60). In these he concluded that the court had jurisdiction, the plaintiffs having "no adequate remedy at law, administrative or otherwise," and could grant the relief prayed for if the evidence warranted it (R. 244-47, 259).

More specifically, the Special Master ruled that neither the National Railroad Adjustment Board nor the System Board had jurisdiction of the dispute because (a) "the dispute * * * grows out of the interpretation or construction of the statute, more particularly sub-paragraph (c) of Section 2 Eleventh of the Railway Labor Act * * * " rather than out of the interpretation or construction of the union shop agreement, which "merely recites the lan-

guage of the statute"; and (b) because "the real dispute here is one between the plaintiff employees and the statutory bargaining representative" rather than a dispute which "falls within the classification of disputes between employees and carriers," the only category of disputes cognizable by the National Railroad Adjustment Board under Section 3 First (i) or by a system board under Section 3 Second of the Act (R. 246). Finally, the Special Master ruled that under Section 3 First (f) neither the Secretary of Labor nor a three-man board appointed by the National Mediation Board had jurisdiction to determine whether a labor organization is "national in scope." This was so, he decided, because UROC had never made a claim to participate in the selection of labor members of the National Railroad Adjustment Board and, accordingly, there was no "dispute" as to UROC's right to participate in such selection. "The existence of such a dispute or such a claim is essential to the jurisdiction of the Secretary and consequently of the National Mediation Board * * *" (R. 246).

On the evidence, however, the Special Master concluded that "the United Railroad Operating Crafts * * * was at no time during the sixty (60) day period beginning with April 1, 1952, national in scope within the meaning of the Railway Labor Act, as amended" (R. 260).

The petitioners filed objections and exceptions (R. 261-69). On June 29, 1953, after briefs had been filed with the Court, Judge Philip L. Sullivan entered orders overruling the objections and exceptions to the Special Master's Report and Findings, and adopting and confirming the Report and Findings as the Findings of Fact and Conclusions of Law of the court; determining that UROC was not national in scope at any time during the sixty (60) day period commencing on April 1, 1952; dissolving the temporary restraining order; denying the prayer for permanent relief; and dismissing the complaint for want of equity (R. 270-71).

Petitioners filed their Notice of Appeal to the Court of Appeals for the Seventh Circuit on the same day (R. 273), and on June 30, 1953, an injunction was entered restraining the individual petitioners' discharge pending appeal (R. 275).

The Transcript of Record was filed in the Court of Appeals on August 6, 1953, and the Printed Record on December 22, 1953.

REASONS FOR GRANTING THE WRIT.

I.

The Public Interest Will Be Promoted by the Prompt Determination by This Court of the Jurisdictional Issue Presented by the Petition.

As pointed out in the Petition for a Writ of Certiorari in *United Railroad Operating Crafts* v. *Wyer,* No. 472, filed in this court on November 20, 1953, the question of whether the federal courts have jurisdiction to determine the "national in scope" character of a railway labor organization under a union shop agreement entered into pursuant to the Union Shop Amendment to the Railway Labor Act is of great importance in the administration of the Act (Petition, No. 472, pp. 13-17). It was there stated that the question had already arisen in a number of courts: this is one of the cases referred to (Petition, No. 472, pp. 16 and 22).

As matters now stand this case will be argued in the Court of Appeals for the Seventh Circuit on the merits. If the conduct of the parties in the District Court is any indication of their probable conduct in the Court of Appeals, it is likely that the Pennsylvania Railroad will take a somewhat noncommittal position. The BRT, despite the fact that it raised the jurisdictional issue in its Amended Answer (R. 44), will probably devote its main efforts to securing an affirmance on the merits. It did not press the jurisdictional question in the District Court, and it did not cross-appeal from the ruling that the court properly had jurisdiction of the subject matter. The Brotherhood of Locomotive Engineers, the *amicus* in the District Court which urged in no less than five written Briefs that the

court lacked jurisdiction, has not as yet moved for leave to appear in the same capacity in the Court of Appeals.

Consequently, petitioners are confronted with an anomalous situation, likely to lead to extensive but futile briefing and argument. For, since the Court of Appeals on its own motion may raise the jurisdictional issue, or the BRT may change its position and decide to argue the jurisdictional points raised by its Amended Answer, or the Brotherhood of Locomotive Engineers may appear as an *amicus curiae* and repeat the arguments it advanced in the District Court, petitioners cannot afford not to argue both the jurisdictional issue and the merits. Yet the former question is likely to be determined by what this court does with the Petitions in Cases Nos. 472 and 513, while the latter question may very well be rendered irrelevant by what this court decides.

Furthermore, this case, on its facts, complements the cases now before this Court as Petitions for Certiorari Nos. 472 and 513. The agreements involved in those cases, between the unions and the Long Island Rail Road and the New York, New Haven and Hartford Railroad in No. 472 and between the union and the Northern Pacific Railway in No. 513, did not provide for System Boards of Adjustment as the tribunals for resolving disputes arising under the agreements. But here, the union shop agreement between the BRT and the Pennsylvania Railroad provides that such disputes shall go to a System Board of Adjustment set up by the agreement itself. Consequently, on the view that the courts lack jurisdiction of such a case as this, the remedy of the individual employee is to go to the System Board—not to the National Railroad Adjustment Board as in Nos. 472 and 513.

The whole question of the adequacy of the remedy thus posed is even sharper here than in Nos. 472 and 513. For,

under Section 3 Second of the Railway Labor Act, a collective bargaining representative and a carrier may agree to the establishment of a system board of adjustment "for the purpose of adjusting and deciding disputes of the character specified in this section."

The agreement here provided for a System Board of Adjustment consisting of four (4) members, two designated by the Pennsylvania Railroad and two by the BRT (R. 15). The Board prescribes its own rules (R. 30-34), and its decisions are "final and binding" (R. 15).

In view of this circumstance, therefore, this case, if before the Court along with No. 472 and 513, would materially assist the Court in considering all the legal and constitutional questions posed by the basic problem of whether a court or some Railway Labor Act administrative tribunal has the power to interpret and apply the statutory language "national in scope" as used in the Union Shop Amendment to the Railway Labor Act. The public interest will be served by having all these aspects of the problem before the Court at the same time.

II.

The Further Reasons Urged for Granting the Writs in No. 472 (Petition, pp. 17-26) and No. 513 (Petition, pp. 7-9) Are All Applicable Here.

Basically the problem here is the same as in Nos. 472 and 513. Consequently the reasons for granting the writs urged in those Petitions are equally valid in this case. As a matter of fact, since a System Board of Adjustment is provided under the Pennsylvania Railroad—BRT agreement, the constitutional implications of the view that the Railway Labor Act provides an adequate remedy to the discharged employee are, by reason of the make-up and rules

of the System Board, even more strikingly posed here than in the other two cases. How such a body can constitutionally receive a delegation of legislative or judicial power, and how, consistently with due process of law, a discharged employee can be compelled to seek his sole remedy before such a tribunal is impossible for petitioners—as it was for the District Court—to understand.

Apart from the fact that this Petition is seeking review prior to judgment in the Court of Appeals, it is submitted that it presents even stronger reasons for the granting of a writ of certiorari than Nos. 472 and 513.

CONCLUSION.

For the reasons outlined above, petitioners respectfully urge this Court to grant their petition along with the petitions filed in Nos. 472 and 513.

Respectfully submitted,

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Counsel for Petitioners.

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Of Counsel.

FILED
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HAROLD B. WILLE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION

Opinions Below

This cause is now pending on appeal in the Court of Appeals for the Seventh Circuit. On February 10, 1954, petitioners filed their brief in the Court of Appeals and it may be anticipated that the oral argument will be heard sometime in April, 1954. The decree and the order of the

District Court (R. 270, 271) adopting and confirming the Report and Findings of Fact and Conclusions of Law of the Special Master (R. 242-54 and 256-60) are not reported.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1), 62 Stat. 928.

Question Presented

Does a District Court of the United States have jurisdiction, in a case brought before it under Section 1337 of Title 28 of the U. S. Code to determine whether or not a given railway labor organization is national in scope and organized in accordance with the provisions of the Railway Labor Act within the meaning of the Union Shop Amendment to the Railway Labor Act or does a system board of adjustment established by a union shop agreement to settle disputes arising under said agreement and composed of two representatives of the carrier and two of the railway labor organization party to said agreement have exclusive primary jurisdiction to determine whether the given railway labor organization is national in scope and organized in accordance with the Railway Labor Act, as amended?

Statutes Involved

Title 28, U.S.C., Section 1337:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Title 45, U.S.C., Section 152 and 153 (Railway Labor Act, Sections 2 and 3):

The Union Shop Amendment to the Railway Labor Act, as amended, which was enacted in 1951, appears as Section 152 Eleventh of the Act.

Section 153 Second authorizing the establishment of system board of adjustment reads:

Nothing in this section shall be construed to prevent any individual carrier, system or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days notice to the other party elect to come within the jurisdiction of the Adjustment Board.

Statement of the Case

On July 7, 1952, United Railroad Operating Crafts, hereinafter called UROC, and six individuals filed their complaint in the United States District Court, Northern District of Illinois, Eastern Division, to enjoin the Pennsylvania Railroad Company, hereinafter referred to as the Pennsylvania, from discharging from its employ the individual plaintiffs and requesting, among other things, relief by way of declaratory judgment (R. 5-21).

The complaint alleged that on March 26, 1952, the Pennsylvania entered into a union shop agreement with the Brotherhood of Railroad Trainmen, hereinafter referred to as the Trainmen, effective April 1, 1952, which provided that employees in the crafts and classes represented by the bargaining agent, the Trainmen, must as a condition

of their continued employment become and remain members of the Trainmen within sixty days of the effective date of the Union Shop Agreement (R. 6, 7, 12-17). The agreement also provided that the requirement of membership in the Trainmen "shall not be applicable * * * to employees * * * who maintain membership in any of the other labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service, * * *" (R. 12, 13). The agreement as to the membership requirement is substantially in the language of the union shop amendment added to the Railway Labor Act in 1951 (45 U.S.C. 1952, Supp. 152, Eleventh). The union shop agreement also establishes a system board of adjustment consisting of two members to be appointed by the Pennsylvania and two by the Trainmen for the purpose of disposing of disputes arising under the agreement (R. 15), and it provides procedures to be followed in handling disputes arising under the union shop agreement (R. 14-16).

The complaint alleged that the individual plaintiffs were members of UROC and that UROC was, at all times mentioned in the complaint, a labor organization national in scope and organized in accordance with the Railway Labor Act (R. 6). It further alleged that the Trainmen was the bargaining representative of the crafts and classes to which the individual plaintiffs belonged and that the union shop agreement applied to the crafts and classes of employment to which the individual plaintiffs belonged (R. 7). It was alleged that following the taking of the procedural steps required by the agreement, the System Board of Adjustment caused notice to be served on each of the individual plaintiffs that the Board would hold hearings on July 9, 1952 at Philadelphia, Pennsylvania, concerning their com-

pliance with the provisions of the union shop agreement (R. 8, 12-21).

The complaint challenged the validity of the union shop agreement as violative "of the individual plaintiffs' contracts of employment with the defendant and the statute * * *," (R. 8). It asserted such invalidity on the grounds, among others, that the agreement failed to provide for conference and settlement of disputes by negotiation prior to formal administrative adjudication as contemplated by the Railway Labor Act and that any hearing in Philadelphia, Pennsylvania, is unnecessary and violative of the Railway Labor Act in that the plaintiffs' witnesses, employment records and evidence of membership are located in Chicago, Illinois (R. 8-9).[1]

It is further asserted that the discharge by the Pennsylvania of members of UROC and making them "travel such undue long distances", if continued, would destroy UROC, "contrary to the fundamental rights guaranteed by the Constitution of the United States, by the Railway Labor Act and by the Labor Management Relations Act" (R. 9).

In their prayer, the plaintiffs prayed for temporary and permanent injunctive relief that the Pennsylvania be enjoined from discharging the individual plaintiffs until they were given the opportunity at conference or hearing near their usual places of employment to show their member-

[1] During the hearing before the Special Master, the alleged invalidity based on the ground that employees were required to go to Philadelphia for hearing was abandoned (Tr. 769-93). In their briefs to the Special Master and to the District Court, petitioners asserted several further grounds of invalidity under the Railway Labor Act including the composition of the membership of the System Board and the claimed character of the dispute as one between employees and their representative rather than between a carrier and its employees.

ship in UROC and thereafter permitting discharge only if they had failed at such conference or hearing to establish membership in UROC. The prayer also sought damages and requested a declaratory judgment setting forth the plaintiffs' rights under the Railway Labor Act in the above regards (R. 10-11).

On July 8, 1952 following hearing on plaintiffs' "Verified Motion for Temporary Restraining Order and Preliminary Injunction", the District Court issued a temporary restraining order in the terms requested by plaintiffs' motion which enjoined the Pennsylvania from discharging the individual plaintiffs until they had been afforded the opportunity at hearing or conference near their places of employment to show themselves to have been members of UROC within sixty days of the effective date of the union shop agreement "and then only if they fail so to show" (R. 22). The hearing scheduled by the System Board of Adjustment to be held on July 9, 1952, has never been held.

On July 18, 1952, the Pennsylvania filed its answer in substance denying the essential allegations of the complaint and raising certain matters as affirmative defenses (R. 23-27). The answer of the Pennsylvania specifically denied that the Court had jurisdiction (R. 23, Section 1 of Answer). On August 4, 1952, the Trainmen was permitted to intervene as a party defendant in this proceeding (R. 35, 36).

On August 13, 1952, the Trainmen filed its answer which likewise denied the essential allegations of the Complaint except that it admitted that "the Court has jurisdiction of the subject matter of this cause on the grounds that the issues herein require an authoritative construction of the Railway Labor Act as amended, 45 U.S.C.A., Sections 151 *et seq.*" (R. 36-42). On September 19, 1952, the Train-

men filed an amended answer in which it alleged that the Court lacked jurisdiction of the subject matter of this proceeding (R. 44-51). On the same side, the case was referred to a Special Master to take evidence on the issues and to report the same with findings of fact and conclusions of law (R. 51-52).

On August 6, 1952, the Brotherhood of Locomotive Engineers was given leave to file briefs and participate as *amicus curiae* and on or about September 10, 1952, the *amicus* filed its first brief. Hearings were held and a total of almost 1,000 transcript pages of testimony taken on November 10, 12, 13, 17, 18, 19 and 20, 1952.

Thereafter briefs were filed. The plaintiffs in their two briefs to the Master raised three major issues in support of the relief prayed for, namely, that the Court had jurisdiction, that UROC was national in scope and organized in accordance with the Railway Labor Act, and that the union shop agreement was invalid. The Trainmen argued that the union shop agreement was valid and that UROC was not national in scope and not organized in accordance with the Railway Labor Act. The Pennsylvania in substance confined its argument to a defense of the validity of the union shop agreement and of the procedures established under it. The *amicus* in several briefs asserted the view that the Court lacked jurisdiction.

On March 27, 1953, the Special Master submitted his Report, and on April 17, 1953, in compliance with an order of the District Court requesting him to state separately his findings of fact and conclusions of law, the Special Master submitted his Findings of Fact and Conclusions of Law (R. 242-54, 256-60).

The Special Master concluded that the Court had jurisdiction to determine this dispute, that the union shop agree-

ment was at all times relevant to this proceeding a valid agreement pursuant to the provisions of the Railway Labor Act, as amended, and that UROC was not national in scope at any time during the sixty (60) day period following April 1, 1952 (R. 259-60). Accordingly, the Special Master recommended to the Court the entry of a decree adopting his conclusions of law and findings of fact, dissolving the temporary restraining order, and dismissing the complaint for want of equity (R. 260).

Thereafter, on April 27, 1953 the plaintiffs filed with the District Court numerous objections to the Report, Findings of Fact and Conclusions of Law of the Special Master (R. 261-69). Following the submission of briefs in which the various parties in substance urged the same views which they had urged to the Special Master, the District Court on June 29, 1953 entered orders overruling the objections and exceptions to the Special Master's Report, Findings of Fact and Conclusions of Law and adopting such Findings and Conclusions as the Findings of Fact and Conclusions of Law of the Court (R. 270-71). The decree declared UROC to be not national in scope during the relevant sixty (60) day period following the effective date of the union shop agreement (R. 270). It dissolved the temporary restraining order, denied permanent injunctive relief and dismissed the complaint (R. 270).

On the same day, June 29, 1953, the plaintiffs filed Notice of Appeal to the Court of Appeals for the Seventh Circuit (R. 273) and the District Court granted an injunction restraining the discharge of the individual plaintiffs pending appeal (R. 275). That injunction is now in effect and the individual plaintiffs have at no time been discharged from their employment.

On January 15, 1954, the plaintiffs filed with the Court of Appeals for the Seventh Circuit a motion for an exten-

sion of time for filing their brief in that Court until twenty (20) days from the date of the final disposition by the Supreme Court of the petition for certiorari which was to be filed in this proceeding. On January 27, 1954, the Court of Appeals issued an order denying this motion and setting February 10, 1954 as the due date for plaintiffs to file their brief. Accordingly, on February 10, 1954, plaintiffs filed their brief in the Court of Appeals contending that the District Court had jurisdiction to determine whether UROC was national in scope under the Railway Labor Act and that UROC was national in scope. The defendants' briefs are due on March 2, 1954.

Argument

In this cause, petitioners in a petition for certiorari filed January 25, 1954 request this Court to review the determination of the District Court that it had jurisdiction of the subject matter of the cause prior to judgment by the United States Court of Appeals for the Seventh Circuit where this case has been pending on notice of appeal filed by petitioners on June 29, 1953.[2] Under the circumstances, however, disclosed by this petition and the record upon which it is based, denial of this petition is warranted.

1. There can be no question that this case is properly before the Court of Appeals for the Seventh Circuit and that the case and the decree of the District Court from which petitioners have appealed to that Court present issues of the kind which it is the function of a United States Court of Appeals to decide (28 U.S.C. 1953 Supp. Sec. 1291). There can be no question that Congress in establishing the Courts of Appeals "intended to create courts of great dignity and ability whose decisions were to be

[2] On August 6, 1953, the Certified Transcript of Record was filed in the Court of Appeals for the Seventh Circuit.

final except in the very limited instances where the Supreme Bench should pronounce for the whole nation." *N.L.R.B.* v. *Mexia Textile Mills*, 339 U.S. 563, 572 (dissenting opinion of Mr. Justice Frankfurter.)

The petitioners herein propose not a review by the Supreme Bench of a decision and decree of a Court of Appeals but the exercise of the far more rarely used power of this Court to by-pass a determination by the Court of Appeals before which the cause is properly pending and to review directly the decree of the District Court insofar as the jurisdictional basis is concerned. It has been stated concerning the utilization of certiorari jurisdiction prior to rendition of judgment by a court of appeals that "this is a power not ordinarily to be exercised." *The Three Friends*, 166 U.S. 1, 49.

Certiorari prior to judgment of the Court of Appeals has been granted in cases of great constitutional significance such as *Norman* v. *Baltimore & Ohio R. Co.*, 294 U.S. 240, upholding the constitutionality of the legislation which took the United States off the gold standard; or in an emergency situation which demands a prompt authoritative determination as in *United States* v. *United Mine Workers*, 330 U.S. 258, where a nationwide coal strike threatened.

The record of this case and the arguments of petitioners in support of their petition for certiorari do not disclose any nationwide emergency or pressing national need for immediate decision by this Court of the question presented by the petition.

The individual petitioners are protected from discharge by the injunction pending appeal issued by the District Court and have been protected from discharge from the day this suit was instituted. The petition and record disclose no imminent jeopardy or threat to collective bargain-

ing stability on the railroads. The petition and record disclose no emergency situation which prompt determination by this Court rather than by the Court of Appeals would avert or mitigate.[3] This Court has denied certiorari requested prior to rendition of judgment by the Court of Appeals in cases of far greater national importance than this case. *Electric Bond and Share Co., et al.* v. *Securities and Exchange Commission, et al.*, 301 U.S. 709, discussed in *The Business of the Supreme Court at the October Terms, 1935 and 1936*, Frankfurter and Fisher, 51 Harvard L. Rev. 577 at p. 616, Note 69. In the *Electric Bond* case the Court denied certiorari prior to judgment by the Supreme Court postponing thereby for at least six months, the earliest possible time at which the Public Utility Company Act of 1935 could become effective. Again in *Davis* v. *Boston & Maine R. R.*, 299 U.S. 614, the denial of certiorari prior to rendition of judgment by the Court of Appeals postponed decision as to the constitutionality of the unemployment compensation provisions of the Social Security Act.

In argument incorporated by reference into this petition from Petition No. 472 (Petition, p. 9), petitioners assert beyond the bounds of reasonable inference that "if the decision below is allowed to stand, hundreds and perhaps thousands of railroad employees on perhaps dozens of railroads will be discharged" (Petition No. 472, p. 16).

The decision referred to is the *per curiam* opinion of the Court of Appeals from the Second Circuit in the case *United Railroad Operating Crafts, et. al.* v. *Wyer, et al.*,

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[3] At the time of filing their Petition for Certiorari on January 25, 1954, Petitioners' brief to the Court of Appeals was due on February 1, 1954, pursuant to an order of that Court which granted Petitioners' motion for an additional 20 days from January 12, 1954 within which to file their brief.

205 F. 2d 153 (C.A. 2), and the quoted assertion as applied to the present proceeding is plainly intended to stress the importance of the jurisdictional issue raised by Petitioners.

But no such mass discharge hinges upon this litigation. A decision that UROC is not national in scope, whether by decision of court or administrative determination, does not open the gates for discharge of men who were or are members of UROC. Such a decision under the statute places upon operating employees covered by a valid union shop agreement the obligation to become members of the contracting union.[4] It does not compel them to resign their membership in or to refrain from joining UROC under penalty of discharge. In short, under Section 2 Eleventh, Subdivision (a) of the Railway Labor Act, as amended, men covered by a union shop agreement are required to join the contracting union but they may with impunity assume or continue any other union membership as they see fit.

Nor is it established that "if the decision below is allowed to stand, hundreds and perhaps thousands of railroad employees" will be compelled to assume union allegiance with contracting unions. The number of men affected even in this limited sense will depend not upon the number of union shop agreements or the number of UROC members but upon the number of UROC men covered by union shop agreements. In the case of those railroads which have not entered into union shop agreements covering operating employees, UROC men are not affected. Lists of union shop agreements set forth by Petitioners (Petition No. 472, pp. 14-16 incorporated by reference in this Petition at p. 9) and assertions of membership

[4] or, of course, some other labor organization national in scope.

in a specified number of railroads do not then establish cataclymsic impact on a nationwide basis. Although several labor organizations other than the five standard organizations hold bargaining agreements covering operating employees of the railroads,[5] judicial controversy on the questions raised by this petition have been limited to the one organization, UROC.

Finally, the assertions of fact, contained in Petition No. 472 at pp. 13-17, which are incorporated by reference into the petition in this proceeding (Petition, p. 9) intended to establish the nationwide importance of the issue involved herein, are not supported by any record references.[6] Factual assertions which may have been admitted for purposes of ruling on a motion to dismiss before the district court in the case upon which Petition No. 472 is based are not facts of record for the purpose of a different matter, namely, of appraising major national importance of the issues presented by the petition in this, an independent proceeding, involving to some extent different parties [7] in order to determine whether this proceeding warrants the exercise by this Court of its jurisdiction.

2. The questions of constitutionality raised by petitioners in their Petition for Certiorari predicated upon

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[5] See Eighteenth Annual Report of National Mediation Board (1952), Table 12A.

[6] We do not question the existence of union shop agreements in the case of railroads which are party to any of the various proceedings referred to in Petitions Nos. 472, 513 and 548 now before this Court and a number of the factual assertions embodied from Petition No. 472 may in that proceeding be admitted for one purpose or another.

[7] The railroad defendants and the individual plaintiffs are different. UROC and this Brotherhood are parties in both proceedings. Other Brotherhoods are also party to the proceedings in the Second Circuit.

an alleged lack of due process in the procedures of the National Railroad Adjustment Board and alleged unconstitutional delegation of powers to the Board, are not properly before this Court.[8]

The pleadings raised no such constitutional questions. No such arguments challenging the constitutionality of the administrative agencies set up under the Railway Labor Act or of the procedures of such agencies were urged to the Special Master or to the District Court. Petitioners' Statement of Points in connection with their appeal to the Court of Appeals for the Seventh Circuit does not raise any such questions of constitutionality (R. 284, 285). Only constitutional issues raised in the lower courts are before this Court on appeal. *Shelley* v. *Kraemer,* 334 U.S. 1, 8; *Duignan* v. *United States,* 274 U.S. 195, 200.

3. There is no conflict between different Courts of Appeals on the question of jurisdiction which petitioners present in their petition. The Court of Appeals for the Second Circuit affirmed the opinion of the District Court dismissing the amended complaint for want of jurisdiction over the subject matter.[9] The Court of Appeals for the Ninth Circuit remanded to the District Court the cause of *United Railroad Operating Crafts, et al.* v. *Northern Pacific R. R. Co., et al.,*[10] with direction to dismiss for lack of jurisdiction. There are no decisions by any of the other Courts of Appeals.

The District Court in the instant proceeding, in the circumstances presented by the pleadings and the record, adopted the findings of fact and the conclusions of law of

[8] Petition, pp. 11 and 12.

[9] *UROC, et al.* v. *Wyer, et al.,* 205 F. 2d 153 (C.A. 2), affirming opinion in 115 F. Supp. 359.

[10] 208 F. 2d 135 (C.A. 9).

the Special Master and ruled that the Court had jurisdiction to determine the issues presented by the case, that UROC was not national in scope, and that the union shop agreement was valid (R. 270, 271). In the case of *Johns* v. *Baltimore & Ohio R. Co.*, Judge Walter L. LaBuy of the United States District Court for the Northern District of Illinois, Eastern Division,[11] entered an order on January 20, 1954, that the injunction be dissolved and the cause dismissed for lack of jurisdiction.[12] These two cases, as we urge below, are not in conflict.

In any event, however, it is the function of the Court of Appeals for the Circuit in question to resolve any conflict of decision which may exist among the district courts within the circuits, and to relieve this Court from the task of supervising the decisions of the district courts. When the Court of Appeals has rendered a decision in the matter, the question of uniformity in application of Federal law on a national level emerges for possible determination by this Court in its discretion as arbiter of legal issues of national significance.

4. This proceeding differs in significant respects from the *Johns* case and from the proceedings on which Petitions Nos. 472 and 513 are predicated. This proceeding is the only one in which the union shop agreement established a system board of adjustment in accordance with Section 3 Second of the Railway Labor Act to resolve disputes arising under the agreement. That agreement provides for a board to be composed of two members appointed by

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[11] Case No. 53 C. 1927.

[12] The plaintiff in that case had invoked a three-judge court. On January 20, 1954, the three-judge court was dissolved by its order on the ground that the amended complaint did not raise a substantial constitutional question. The decision of the three-judge court is unofficially reported at 33 LRRM 2413.

the carrier and two members appointed by the Trainmen (R. 15). Although such a board has jurisdiction under the Railway Labor Act to determine such matters as the membership of employees in a labor organization,[13] it is submitted that Congress did not intend to endow a local board lacking powers of subpoena and discovery with exclusive jurisdiction to determine a non-local issue such as the national in scope status of a railway labor organization. It has been observed in considering the jurisdiction of a system board of adjustment in the case of a discharge grievance where the aggrieved employee had brought his claim to the National Railroad Adjustment Board that the purpose of a system board "was to continue the local settlement of disputes, in accordance with established practice, if a carrier and its employees, acting through their representatives, should so elect." *Atlantic Coast Line R. Co.* v. *Pope,* 119 F. 2d 39, 43 (C.A. 4.) The dispute as to the national in scope status of a railway labor organization is not a dispute susceptible of "local settlement", such as a seniority grievance or a time claim.

Furthermore, the petition oversimplifies the issues of this case. The complaint challenged the validity of the union shop agreement as violative of the Railway Labor Act. This issue, as well as the "national in scope and organized in accordance with the Act" issues, was in its various aspects as urged by petitioners vigorously litigated before both the Special Master and the District Court, and that Court adopted the conclusion, among others of the Special Master, that the union shop agreement was valid pursuant to the provisions of The Railway Labor Act, as

[13] The typical disputes arising under a union shop agreement would present the question of whether an employee was a member of a labor organization rather than the "national in scope" status of the labor organization.

amended (R. 259). That issue of validity of the agreement is not a matter of the interpretation and application of agreements envisaged as exclusively within the jurisdiction of a system board of adjustment. The issue is a legal issue involving the lawfulness of the agreement under the Railway Labor Act.[14] *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774; *Hayes* v. *Union Pac. R. Co.*, 184 F. 2d 337 (C.A. 9).

In any event, the determination of whether in this proceeding the District Court properly exercised its jurisdiction should not be split. The District Court predicated its decree dissolving the injunction and dismissing the complaint not only upon findings and conclusions that UROC was not national in scope in the relevant period of time, but upon the conclusion that the union shop agreement challenged by UROC was valid under the Railway Labor Act, as amended.

It is respectfully urged that the propriety of the District Court's exercise of jurisdiction in the circumstances of this case cannot adequately be determined as proposed by petitioners on a piece-meal basis separated from the context of the other issues as they were heard and ruled upon by the District Court.

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[14] It is and has throughout this litigation been this respondent's position that the union shop agreement is valid.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be denied.
February 23, 1954.

Respectfully submitted,

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EDWARD B. HENSLEE,
ROBERT E. HARRINGTON,
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Of Counsel for Brotherhood of Railroad Trainmen.

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MAR 4 1954

HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 548

UNITED RAILROAD OPERATING CRAFTS, A RAILWAY LABOR ORGANIZATION NATIONAL IN SCOPE, AND WILLIAM E. FLOWERS, F. R. GIBBS, SR., D. R. KELLY, C. L. SHEAY, AND H. W. HARMON, INDIVIDUALLY AND ON BEHALF OF ALL OTHER MEMBERS OF THE PLAINTIFF LABOR ORGANIZATION AS A CLASS WHO ARE TOO NUMEROUS TO BE MADE PARTIES PLAINTIFF,

Petitioners,

—against—

THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION, AND THE BROTHERHOOD OF RAILROAD TRAINMEN, A VOLUNTARY RAILROAD LABOR ORGANIZATION,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI.

EDWARD J. FRUCHTMAN,
RICHARD F. WATT,
Counsel for Petitioners.

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THE DUNHOP-WARREN PRINTING COMPANY, CHICAGO — 56

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Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Brief of the Brotherhood of Railroad Trainmen in Opposition suggests that petitioners, in seeking review in this Court prior to judgment in the Court of Appeals for the Seventh Circuit, are improperly seeking to "by-pass" that court (BRT Brief, p. 10). Since the cause is "properly pending" in the Court of Appeals, the argument goes, there is no reason whatsoever for this Court to consider it in advance of judgment there.

What this line of argument overlooks is the fact that petitioners are asking this Court to determine only the jurisdictional issue that has already been presented to the Court in petitions Nos. 472 and 513. Petitioners are not asking that this Court make any determination whatsoever on the merits in advance of judgment in the Court of Appeals. They believe, however, that were this Court to grant the petitions in Nos. 472 and 513 it would be a senseless procedure for counsel and the Court of Appeals to consider the merits at a time when the jurisdictional issue was to be decided by this Court. Consequently, petitioners are urging the Court to grant this petition, No. 548, only if the basic issue of jurisdiction is to be determined as the result of the granting of petitions Nos. 472 and 513. If the issue is worth deciding, it is worth deciding in all the cases at one time, particularly where each separate case has something to offer, in its facts and in the course of its proceedings, to an overall understanding of the jurisdictional problem.

Moreover, the Brief of the BRT fails to take account of the anomalous position of the BRT itself. For the BRT, as appears below, has blown hot and cold on the jurisdictional question throughout the litigation. At one time it asserts that the district court properly has jurisdiction, and at another it pleads the contrary. The result is that no one, and probably not even the BRT, can predict what position the BRT will take in the Court of Appeals. Thus petitioners have no way of knowing whether the issue of jurisdiction will be contested in that court; they therefore have been compelled in the Court of Appeals to brief the merits—the question of whether or not the United Railroad Operating Crafts is national in scope—even though the Court of Appeals may never reach that question. Rather than have the proceedings in the Court of Appeals com-

pletely pointless, it seemed to petitioners that the orderly administration of justice would be served if this Court were to settle the jurisdictional issue here at the same time as it decides it in Nos. 472 and 513.

II.

Insofar as the BRT seeks to find other reasons why this Court should deny the petition for certiorari, it only succeeds in demonstrating the hopeless confusion which has surrounded the jurisdictional issue in every court in which it has arisen. For the BRT now apparently takes the position—very gingerly, to be sure—that the district court was correct in finding that it had jurisdiction (BRT Brief, pp. 15-16).

The reasoning advanced in support of this view is noteworthy. According to the BRT the district court had jurisdiction here because the union shop agreement between the BRT and the Pennsylvania Railroad provided that disputes were to be determined by a System Board of Adjustment consisting of two BRT representatives and two carrier representatives. In distinguishing this case from Nos. 472 and 513, the BRT is therefore urging that where the union shop agreement provides for a System Board of Adjustment the courts have jurisdiction; where the agreement makes no such provision and disputes are to be heard by the National Railroad Adjustment Board, however, the courts do not have jurisdiction. Although the plain wording of Section 3 Second of the Railway Labor Act indicates that System Boards of Adjustment are to have the same jurisdiction to decide "disputes of the character specified" in Section 3 as does the National Railroad Adjustment Board, the BRT now contends that their functions and powers are quite different. The basis for this novel statutory construction is nowhere explained.

This current view of the BRT bears comparison with prior BRT contentions in this case and with BRT positions in some of the other cases. In its original Answer the BRT admitted "that the Court has jurisdiction of the subject matter of this cause on the grounds that the issues herein require an authoritative construction of the provisions of The Railway Labor Act as amended * * *" (R. 37). In its Amended Answer it asserted that "the Court lacks jurisdiction over the subject matter * * *" because the System Board of Adjustment "has exclusive jurisdiction of disputes arising out of the interpretation or application of said Agreement" (R. 44). Before the Special Master, the BRT said little or nothing about the question of jurisdiction, and when the Master found that the court properly had jurisdiction of the subject matter (R. 259), the BRT did not except. When the district court approved the report of the Special Master and ruled that it had jurisdiction (R. 270-71), the BRT took no cross-appeal to the Court of Appeals. Now that the cause is pending in the Court of Appeals on petitioners' appeals from the district court's adverse ruling on the merits, all that can be said for certain is that the BRT is aware that the jurisdictional issue exists.

The BRT in other cases has been less equivocal. In No. 472, the BRT asserted from the beginning that the court lacked jurisdiction, and it is still of that opinion (BRT Brief, No. 472, pp. 13-15). In No. 513, the BRT has also been consistent in contending that the court lacked jurisdiction (BRT Brief, No. 513). In those cases, the union shop agreements did not provide for System Boards of Adjustment, as does the union shop agreement between the BRT and the Pennsylvania Railroad involved in this case. Consequently, one might conclude that the current view of the BRT here is consistent with that of the BRT in Nos. 472 and 513.

But in the case of *Pigott* v. *Detroit Toledo & Ironton Railroad Company*, in which a petition for certiorari was filed on March 1, 1954 and docketed as No. 607, the BRT has contended from the beginning that the court lacked jurisdiction, *even though there the union shop agreement provided for a System Board of Adjustment* (Pet. for Cert., No. 607, p. 10). Thus, even assuming that the BRT's distinction between the powers of a System Board of Adjustment and those of the National Railroad Adjustment Board is a tenable one, the BRT has here advanced a view which is at odds with the position it has taken in the *Pigott* case.

In pointing out these inconsistencies, petitioners do not wish to convey the impression that they believe BRT counsel to have argued in any court in bad faith. What they do believe is that these peregrinations on the part of the BRT demonstrate the complexity and importance of the jurisdictional issue as well as the confusion with which both courts and counsel have approached it.

III.

Finally, petitioners wish to call the Court's attention to the *Pigott* case, No. 607, filed on March 1, 1954, and also to *Johns* v. *Baltimore & Ohio Railroad Company*, in which a direct appeal from a three-judge court sitting in the Northern District of Illinois will be docketed in this Court within the next few days.

No. 607 differs from the other cases in several important respects. The union shop agreement between the BRT and the railroad in that case provided for a System Board of Adjustment. *Court proceedings were instituted, however, after hearings before the System Board and after determinations by the Board that the individual plaintiffs were not in compliance with the union shop agreement.*

Furthermore, the district court there ruled that although the System Board was not a proper tribunal to decide whether the United Railroad Operating Crafts was "national in scope", the court could not decide the issue in view of the provisions of Section 3 First (f) of the Railway Labor Act. Section 3 First (f) provides that in the event the right of a railway labor organization to participate in the selection of labor members of the National Railroad Adjustment Board is disputed, the Secretary of Labor and ultimately a three-man board shall decide whether the organization is qualified, *i. e.*, whether it is "national in scope" and is organized in accordance with the provisions of the Railway Labor Act.

In *Johns* v. *Baltimore & Ohio Railroad Company,* a direct attack was made on the constitutionality of the union shop amendment to the Railway Labor Act on the ground that the language "national in scope" is so vague and meaningless that reasonably intelligent men, in attempting to make the decisions which the Act and agreements pursuant to it require them to make if they desire to continue their employment, can only guess at its meaning. The decision of the three-judge court stated that "no substantial constitutional question is raised" because of the failure of the plaintiff to exhaust his administrative remedy before the National Railroad Adjustment Board. In that case the Baltimore and Ohio Railroad Company has filed a Brief urging this Court to take jurisdiction of the appeal and to decide the constitutional issues; the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen have filed motions to dismiss.

IV.

In conclusion petitioners' counsel wish to take this opportunity to advise the Court that they have done everything in their power to bring before the Court, at or about the same time, as many aspects as possible of the jurisdictional issues here involved. Consequently they have had filed four petitions—Nos. 472, 513, 548, and 607; in addition they are docketing an appeal in the *Johns* case. All of these cases are related, and to a very great extent complementary. They bring before the Court important and troublesome questions which petitioners are not alone in believing this Court should resolve.

Respectfully submitted,

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